# Pengerang Refining Company Sdn Bhd v Sinopec Engineering (Group) Co Ltd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-565–04 OF 2025 AND W-02(IM)(C)-558–04 OF 2025
AZMI ARIFFIN, MOHD FIRUZ AND ONG CHEE KWAN JJCA
9 DECEMBER 2025

*Contract — Performance bond — Whether call on bond unconscionable — Refinery owner demanded payment under performance bond even though contractor had completed construction and handed over refinery to owner — Refinery had passed performance tests and owner had begun earning revenue from its operation — Owner contended contractor owed it delay-damages for the exact amount stated in the performance bond — Whether call on performance bond was unconscionable — Whether High Court rightly granted injunction to restrain owner from demanding for, or receiving, payment under the bond pending outcome of arbitration proceedings between the parties*

The appellant had appointed the respondents to construct a petrochemical refinery ('the facility') in Malaysia. In accordance with the terms of the contract, the respondents had procured in favour of the appellant a USD132m performance bond and a corporate guarantee issued by the first respondent's parent company (SINOPEC Group) guaranteeing the first respondent's obligations and liabilities under the contract. Some ten years into the contract, disputes between the parties arose. The respondents notified the appellant that they were referring the disputes to arbitration as required by the contract. The appellant, however, demanded for payment under the performance bond. The respondents obtained an interim injunction from the High Court restraining the appellant from calling on the performance bond and/or from receiving any payment under it pending the final award in the arbitration proceedings. The instant appeals were against the High Court's granting of the injunction and the dismissal of the appellant's application to set it aside.

**Held**, unanimously, dismissing both appeals:

(1) The law was settled that where works had been completed, any demand on the performance bond was unconscionable (see para 41).

(2) Despite the project having been completed after inspection and testing, the appellant had deliberately withheld issuance of the approved performance test report to the respondents in order to avoid having to issue the certificate of provisional acceptance. The appellant informed the

respondents that they were not entitled to the said certificate because the respondents had not paid the appellant delay-damages amounting to the exact figure stated in the performance bond. The court found that the appellant was not entitled to the alleged damages after the facility had been completed and handed over to the appellant. More so, the appellant had been earning revenue from operating the facility. The appellant's demand on the performance bond was unconscionable and went against the purpose of the bond (see paras 44–45 & 47).

(3) The respondents had made full and frank disclosure of all material facts before the High Court. The appeals herein had no real substance to merit any interference and were accordingly dismissed (see paras 48–52).

**[Bahasa Malaysia summary**

Perayu telah melantik responden untuk membina sebuah loji penapisan petrokimia ('kemudahan tersebut') di Malaysia. Selaras dengan terma kontrak, responden telah mendapatkan, bagi pihak perayu, suatu bon pelaksanaan berjumlah USD132 juta serta suatu jaminan korporat yang dikeluarkan oleh syarikat induk responden pertama (Kumpulan SINOPEC) yang menjamin obligasi dan liabiliti responden pertama di bawah kontrak tersebut. Kira-kira sepuluh tahun selepas kontrak tersebut berkuat kuasa, pertikaian antara pihak-pihak telah timbul. Responden telah memaklumkan perayu bahawa mereka merujuk pertikaian tersebut kepada timbang tara sebagaimana yang dikehendaki kontrak. Walau bagaimanapun, perayu telah menuntut pembayaran di bawah bon pelaksanaan tersebut. Responden-responden telah memperoleh suatu injunksi interim daripada Mahkamah Tinggi yang menghalang perayu daripada memanggil bon pelaksanaan tersebut dan/atau daripada menerima apa-apa pembayaran di bawahnya sementara menunggu award muktamad dalam prosiding timbang tara. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi yang memberikan injunksi tersebut dan penolakan permohonan perayu untuk mengetepikannya.

**Diputuskan**, sebulat suara, menolak kedua-dua rayuan tersebut:

(1) Ia adalah undang-undang yang mantap bahawa apabila kerja-kerja telah disiapkan, apa-apa tuntutan ke atas bon pelaksanaan adalah tidak masuk akal (lihat perenggan 41).

(2) Walaupun projek tersebut telah disiapkan selepas pemeriksaan dan pengujian, perayu telah dengan sengaja menahan pengeluaran laporan ujian prestasi yang diluluskan kepada responden-responden bagi mengelakkan keperluan untuk mengeluarkan sijil penerimaan sementara. Perayu telah memaklumkan responden-responden bahawa mereka tidak berhak kepada sijil tersebut kerana responden-responden tidak membayar ganti rugi kelewatan kepada perayu yang berjumlah seperti dalam bon pelaksanaan. Mahkamah mendapati bahawa perayu

tidak berhak kepada ganti rugi yang didakwa tersebut setelah kemudahan itu disiapkan dan diserahkan kepada perayu. Lebih-lebih lagi, perayu telah memperoleh hasil pendapatan daripada pengoperasian kemudahan tersebut. Tuntutan perayu ke atas bon pelaksanaan adalah tidak masuk akal dan bercanggah dengan tujuan bon tersebut (lihat perenggan 44–45 & 47).

(3) Responden-responden telah membuat pendedahan penuh dan jujur terhadap semua fakta material di hadapan Mahkamah Tinggi. Rayuan di sini tidak mempunyai sebarang merit sebenar untuk mewajarkan apa-apa campur tangan dan oleh yang demikian telah ditolak (lihat perenggan 48–52).]

**Cases referred to**

*Global Upline Sdn Bhd v Kerajaan Malaysia and another appeal* [2018] MLJU 175, CA (refd)

*Nafas Abadi Holdings Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor* [2004] MLJU 148, HC (refd)

**Legislation referred to**

Arbitration Act 2005 s 11
Contracts Act 1950 s 29
Rules of Court 2012 O 29 r 1, O 32 r 6, O 42 r 13, O 92 r 4

**Appeal from**: *Sinopec Engineering (Group) Co Ltd & Anor v Pengerang Refining Company Sdn Bhd* [2025] MLJU 1533 (High Court, Kuala Lumpur)

*Sanjay Mohan (with Muhd Naazraj and Siew Suet Mey) (Sanjay Mohan) for the appellant.*

*Thayananthan a/l Baskaran (with Ng Faye Xiang and Leezzie John) (Baskaran) for the respondent.*

**Azmi Ariffin JCA:**

INTRODUCTION

**[1]** R6 and R7 are two related appeals:

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| R6 | : | Civil Appeal No W-02(IM)(C)558–04 of 2025 (COA) (Encl 107 dated 4 April 2025) |
| In HC | : | Originating Summons No WA-24C(ARB)38–06 of 2024 (Encl 31) |

**[2]** *Enclosure 31 dated 3 July 2024 is the appellant/defendant's application* to set aside under O 29 r 1 and O 32 r 6 and/or O 42 r 13 and/or O 92 r 4 of the Rules of Court 2012, the ex parte order dated 10 June 2024 ('ex parte order')

granted to the respondents/plaintiffs ('the setting aside application').

**[3]** The appellant/defendant ('Pengerang') appealed against the High Court's decision dated 24 March 2025, dismissing the appellant/defendant's application to set aside the ex parte order ('encl 107').

**[4]** The brief facts leading to the setting aside application arose in the following manner:

(a) on 10 June 2024, the respondents/plaintiffs applied for an injunction to restrain the appellant/defendant and/or its agents from:

(i) making a demand on the performance bond dated 26 August 2014 in the sum of USD132,902,900 ('performance bond'); or

(ii) calling and/or receiving monies or payment pursuant to the demand under the performance bond, if already made ('respondent's application');

(b) subsequently, the respondents/plaintiffs obtained the ex parte order, restraining the appellant/defendant from calling and/or receiving monies or payment pursuant to the performance bond pending a final award in the arbitration;

(c) on 14 June 2024, an ad interim injunction order was granted;

(d) on 3 July 2024, the appellant filed the setting aside application; and

(e) the learned High Court judge dismissed the setting aside application on 24 March 2025.

**[5]** Hence, this led to the appellant/defendant's appeal to the Court of Appeal on 4 April 2025 via encl 107:

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| R7 | : | Civil Appeal No W-02(IM)(C)565–04 of 2025 (COA) (Encl 105 dated 4 April 2025) |
| In HC | : | Ex parte Originating Summons No WA-24C(ARB)38–06 of 2024 |

**[6]** Enclosure 1 dated 10 June 2024 is the plaintiff's ex parte application pursuant to, amongst others, under s 11 of the Arbitration Act 2005 to injunct the defendant or its servants or agents from making a demand under the Performance Bond No 99140BGJ6951453 dated 26 August 2014.

**[7]** The learned High Court judge on 24 March 2025 allowed the plaintiff's application to injunct the defendant or its servants or agents from making a demand under the Performance Bond No 99140BGJ6951453 dated 26 August 2014.

**[8]** On 4 April 2025 via encl 105 the defendant appealed to the Court of Appeal.

FACTS OF THE CASE

**[9]** The appellant is a company incorporated under the laws of Malaysia with its registered address at Kuala Lumpur.

**[10]** The first respondent (Sinopec Engineering (Group) Co Ltd) is a company incorporated under the laws of the People's Republic of China.

**[11]** The second respondent (Sinopec Engineering Group Malaysia Sdn Bhd) is a company incorporated under the laws of Malaysia with its registered address at No 3–27, Jalan Puteri 4/8, Bandar Puteri, 47100 Puchong.

**[12]** The first respondent is the world's largest oil refining, gas and petrochemical conglomerate.

**[13]** The respondents are involved, among others, in the business of oil refinery and construction works on large scale infrastructure projects.

THE AGREEMENTS

**[14]** By an agreement in writing and dated in August 2014 ('the EPCC contract'), the respondents agreed to perform certain works, more particularly described as the engineering, procurement, construction and commissioning of Refinery Package 2 (CDU, ARDS and HCDU units) for the Refinery and Petrochemical Integrated Development (RAPID) Project at Pengerang, Johor Darul Ta'zim, for the appellant.

**[15]** In accordance with article 5.2 of the conditions of contract the respondents have procured the following performance securities contract:

(a) a Maybank Performance Bond No 99140BGJ6051453 dated 26 August 2014 for the sum USD132,902,900, being 10% of the contract price, in favour of the appellant; and

(b) a corporate guarantee from SINOPEC Group, the first respondent's parent company, parent company guarantee dated 28 November 2014 (the first parent company guarantee), and delivered to the appellant, which guarantees all the first respondent's obligations and liability under the EPCC contract.

THE ARBITRATION

**[16]** By a letter dated 10 June 2024 (notice of dispute), the respondents gave notice to the appellant in accordance with article 53.1 of the conditions of contract, that identifies the dispute between the parties.

**[17]** By a notice of arbitration dated 10 July 2024, the respondents commenced arbitral proceedings against the appellant.

**[18]** On 9 August 2024, the appellant served a response to notice of arbitration.

THE DEMAND

**[19]** By a letter dated 10 June 2024, the appellant made a demand under the performance bond.

THE HIGH COURT PROCEEDINGS

**[20]** Pursuant to the demand by the appellant, the respondents applied to the High Court for an interim measure to restrain the appellant's call on the performance bond.

**[21]** By an order (ex parte) made on 10 June 2024 the High Court granted an injunction that the appellant be restrained from calling and/or receiving monies or payment pursuant to the demand under the performance bond pending a final award in the arbitration and that an inter partes hearing be fixed on 14 June 2024.

**[22]** On 14 June 2024, the High Court granted an ad interim order that the appellant be restrained from calling and/or receiving monies pursuant to the demand under the performance bond until the inter partes hearing and disposal of the respondents' application.

**[23]** The respondents' application for an interim measure was heard on 11 November 2024 and 6 February 2025.

**[24]** By an order made on 24 March 2025, the High Court granted an interim injunction, restraining the appellant from calling and/or receiving monies pursuant to the demand on the performance bond pending a final award in arbitral proceedings.

**[25]** Simultaneously, the High Court also dismissed the appellant's

application to set aside the order (ex parte).

THE APPELLANT'S APPEALS TO THIS HONOURABLE COURT

**[26]** By a notice of appeal dated 4 April 2025, the appellant appealed to this honourable court against the order made by the High Court allowing the respondents' application for an interim measure ('Appeal 565').

**[27]** By a separate notice of appeal dated 4 April 2025 ('Appeal 558'), the appellant appealed to this honourable court against the order made by the High Court dismissing the appellant's application the ad interim injunction to set aside ('Appeal 558').

THE RESPONDENTS' APPLICATIONS FOR SECURITY FOR COSTS IN THIS HONOURABLE COURT

*Appeal 565*

**[28]** By a notice of motion dated 17 April 2025 ('encl 6'), the respondents filed an application to this court for security for costs in Appeal 565.

**[29]** By an order made on 25 June 2025 ('encl 94'), this court granted an order for the appellant to pay security for costs in the sum of RM10,000 to the solicitors for the appellant.

**[30]** On 14 July 2025, the appellant deposited the RM10,000 into their solicitors account as security for costs.

*Appeal 558*

**[31]** By a notice of motion dated 17 April 2025 ('encl 6'), the respondents filed an application to this court for security for costs in Appeal 558.

**[32]** By an order made on 25 June 2025 ('encl 35'), this court granted an order for the appellant to pay security for costs in the sum of RM10,000 to the solicitors for the appellant.

**[33]** On 14 July 2025, the appellant has deposited RM10,000 into their solicitors account as security for costs.

*Beijing Financial Court proceedings*

**[34]** By an application dated 14 June 2024, the first respondent applied to the Beijing Financial Court to rule that the Industrial and Commercial Bank of

China Ltd ('ICBC') suspend payment of USD132,903,000 under the Counter-Guarantee Bond No LG111311400284 to Maybank.

**[35]** By a civil ruling made on 14 June 2024, the Beijing Financial Court ruled that Industrial and Commercial Bank of China Ltd ('ICBC') suspend payment of USD132,903,000 under the aforesaid counter-guarantee to Maybank.

MAIN ISSUE FOR DETERMINATION

**[36]** Whether the appellant's demand on the performance bond is unconscionable?

THE APPELLANT'S CONTENTION

**[37]** The appellant argument amongst others are as follows:

(a) the respondents' application was filed prior to the appellant making a demand on the performance bond;

(b) in obtaining the ex parte order, the respondents failed to disclose the relevant law concerning the application of article 5.9 of the conditions of contract;

(c) the appellant's call on the performance bond was not unconscionable;

(d) pursuant to article 30.1 of the conditions of contract, the appellant is entitled to delay damages considering that the respondents failed to achieve provisional acceptance by 31 May 2019;

(e) the learned High Court judge erred in finding that the respondents could pursue injunctive relief despite the agreement in article 5.9 of the conditions of contract;

(f) the learned High Court judge had interfered with the arbitral tribunal's jurisdiction by making a finding that the demand on the performance bond is invalid and of no effect;

(g) the learned High Court judge was wrong in his conclusions that the appellant was potentially at fault for the explosion and the consequent delays; and

(h) there is no act of bad faith on the part of the appellant. The appellant is the party which has clearly suffered as a result of the delays caused to the completion of the works by the respondents.

THE RESPONDENTS' CONTENTION

**[38]** The respondents contention amongst others are as follows:

(a) there is a prima facie case that the demand on the performance bond is unconscionable based on the following reasons:

(i) the facility has been completed and handed over to the appellant, who has earned revenue from operating the facility;

(ii) the demand was made after the completion of the facility, which is contrary to the purpose of the performance bond; and

(iii) the appellant had deliberately not disclosed a performance test report, and the fact that the facility is operating;

(b) the convenience test does not apply in an application for an injunction to restrain a call on a performance bond;

(c) the demand on the performance bond tainted by unclean hand, selective and incomplete disclosures;

(d) the appellant is not entitled to delay damages, as the appellant caused the delay;

(e) that article 5.9 of the conditions of contract is void under s 29 of the Contracts Act 1950; and

(f) that article 5.9 of the conditions of contract cannot be enforced, as it is contrary to s 11 of the Arbitration Act 2005.

OUR DECISION

**[39]** Having examined and scrutinised the cause papers, the oral and written submissions made by both parties, we now come to our unanimous decision.

*We will first deal with R7*

**[40]** The test that the respondents are required to satisfy is as follow:

(i) there is a seriously arguable case that the demand on the performance bond is unconscionable; and

(ii) there is prima facie case that the demand on the performance bond is unconscionable.

**[41]** The law is settled that, where the works are completed, any demand on the performance bond will be unconscionable.

**[42]** In *Nafas Abadi Holdings Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor*

A [2004] MLJU 148 the court held as follows:

> Melihat kepada fakta kes, defendan 1 sendiri telah mengakui bahawa plaintif telah menyiapkan hampir 95% dari kerja-kerja di bawah *Building Contract* (eksh A, encl 3). Malahan, perkara ini telah disokong oleh laporan perunding bebas, Barisan Jurutera Perunding Sdn Bhd, yang mengesahkan plaintif telah pun menyiapkan
B 100% kerja-kerja fizikal di bawah kontrak berkenaan. Pada bila-bila masa fakta ini tidak disangkal oleh defendan 1. Malahan, fakta juga menunjukkan bahawa Perbadanan Putrajaya, yang merupakan pihak ketiga, telah menghantar surat kepada plaintif dan defendan 1 memaklumkan bahawa projek itu telah dibuka kepada awam dan fakta ini pun tidak disangkal oleh defendan 1.
C
> Memandangkan keadaan fakta kes ini sendiri, maka mahkamah berpendapat tuntutan ini adalah telah dibuat secara tidak ikhlas (*unconscionable*). Malahan dengan menuntut kesemua jumlah wang di bawah *bank guarantee* tersebut, plaintif telah melakukan fraud kerana tuntutan tersebut telah dilakukan dengan pengetahuan bahawa ianya adalah melebihi dari nilai untuk kerja-kerja pembaikan
D yang patut dilakukan.

**[43]** In *Global Upline Sdn Bhd v Kerajaan Malaysia and another appeal* [2018] MLJU 175, the Court of Appeal, inter alia, held:

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> ... Of course how a performance bond clause is worded may differ but its essence does not depart from the fundamental purpose of providing a form of guarantee given by the contractor which is liable to be called upon by the employer on the occurrence of a breach that results in the failure by the contractor to deliver on its promise to deliver up the completed project within the agreed time frame as per the
F contract.

**[44]** Here, we find that the appellant deliberately withheld the issuing of the approved performance test report for ARDS Unit 1210 to the respondents (despite the project being completed after inspection and testing) in order to
G avoid having to issue the certificate of provisional acceptance.

**[45]** Via a letter dated 8 December 2023, the appellant informed the respondent that they are not entitled to the certificate of provisional acceptance because the respondent has not paid the appellant the delay damages in the
H amount of USD132,902,900 which to us the appellant is not entitled to after the said facility has been completed and handed over to the appellant. More so the appellant has also earned revenue from operating the facility. Accordingly, we find that the appellant demands on the performance bond is
I unconscionable.

**[46]** In addition, the appellant's here is not without remedy after completion when the performance bond should have been handed back, as the appellant can still make a demand on the parent company's guarantees.

**[47]** In summary, we can safely conclude that the calling on the performance bond by the appellant is against the purpose of the said bond.

*R6*

**[48]** In respect of appeal in R6, we find that the respondents have made full and frank disclosure at the High Court.

**[49]** The learned High Court judge at para [26] of his judgment held as follows:

(a) the respondents have disclosed the performance bond and parent company guarantees;

(b) the respondents have disclosed the grounds for the respondent's ex parte originating summons;

(c) the respondents have disclosed all material facts in relation to the incident;

(d) the respondents have disclosed all the relevant materials including points that may be unfavourable to the respondents; and

(e) the respondents have disclosed that there is no previous similar ex parte application made by the plaintiffs.

**[50]** In the upshot, we fully agree with the learned judge decision.

CONCLUSION

**[51]** For the reasons given, we find no real substance in both appeals to merit our interference.

**[52]** The appeal in R6 and R7 is dismissed with costs of RM25,000 for each case subject to allocatur fees.

*Both appeals dismissed.*

Reported by Ashok Kumar